ticular showing it must be transferred, because the language of the various acts of Congress is, whenever the contingencies have occurred provided therein, it shall be the duty of the state court to proceed no further in the cause, and it has been held that all acts subsequently done by the state court are simply void, and that the parties may disregard and pay no attention to anything done by the state court. This is the view I take of the question. I admit it is one of great magnitude. The other question is not free from difficulty, but I have felt inclined to sustain the jurisdiction in that case. The inclination of my mind is against it in this case, and I am willing to make an order remanding the case to the state court, and give the parties, if they so desire, an opportunity of testing the question before the Supreme Court of the United States, which they will have the right to do at once.

Supreme Court of Alabama.

OFFUTT ET AL. *v.* SCOTT.

Real estate purchased by a partnership for partnership purposes, and paid for with partnership funds, as to the creditors of the firm is, in equity, treated as personal property, and will, if necessary, be subjected to the payment of their debts, whether the title be conveyed to the partners by name, or to one of them, or to a third person.

n case of the death of one partner, the survivor is a trustee for all persons interested in the partnership, for the creditors of the firm, for the representatives of the deceased partner or his heirs, and for himself; and for the purpose of closing up the business of the firm, he is invested with the exclusive right of possession and management of the whole partnership property and business. His trust being to wind up the concern, his powers are commensurate with the trust; hence he may collect, compromise, or otherwise arrange all the debts of the firm, and his receipts, payments, and doings generally, in that behalf, are valid, if honestly done, and within the fair scope and purposes of the trust; and until the debts of the firm are paid, neither the personal representatives nor the heirs of the deceased partner have any beneficial interest in the partnership property.

When a partnership is dissolved by the death of one partner, the only remedy at law against the firm, by the creditors of the firm, is by suit against the survivor; and when a creditor has exhausted his remedy at law against the firm, by a suit against the survivor prosecuted to a return of an execution "no property found," he may then file his bill in equity to subject the real estate of the partnership to the payment of his debt, and this, whether the possession be in the surviving partner, the personal representative, or the heirs of the deceased partner, or any other person who is not a *bonâ fide* purchaser for valuable consideration and without notice.

If goods shipped and consigned to a firm doing a commission business, to be sold on account of the shipper, are received, but before they are sold one of the partners dies, the survivor may sell such goods, and, in such case, the claim of the shipper on account of such sale is properly against the firm, and not against the survivor individually.

A variance between the statements of the bill and the proof, if not of such a character as to operate as a surprise to the defendants, and the defendants do not appear to be thereby injured, should generally be held to be immaterial.

If a surviving partner sell and convey his interest in the real estate belonging to the partnership to a *bonâ fide* purchaser for valuable consideration, without notice, before a creditor of the firm has acquired a lien on the same by bill filed to subject it to the payment of his debt, the purchaser will hold it against the general equity of the creditors to have it appropriated to the payment of the partnership debts.

APPEAL from Chancery Court of Montgomery.

The case made by the bill, answers and proof may be stated as follows:

In May 1860, and prior thereto, a partnership composed of R. H. and W. E. Offutt, did business in Montgomery, Alabama, under the firm name and style of R. H. & W. E. Offutt. In September 1860, the firm was dissolved by the death of W. E., who left R. H., the surviving partner, one of his executors. During the existence of the partnership, the brothers, who were equal partners, made a purchase as tenants in common of certain real estate in Montgomery from one Knox, to whom $9000 of the purchase-money was due at the death of W. E. After the purchase the firm used a storehouse on this real estate "as a business stand," in which they carried on business as grocers and commission merchants. The unpaid balance due for the purchase was paid by R. H. with partnership assets after the death of W. E., the debt for this balance being evidenced by "an ordinary negotiable note, signed R. H. & W. E. Offutt." Before the filing of the bill R. H. had been removed, and in his stead A. J. Noble appointed administrator with the will annexed, R. H. having also sold his interest in the real estate to one Waggoner, from whom Ray purchased under circumstances which it was admitted made him a *bonâ fide* purchaser for value and without notice. A partition of the real estate had also been made between Ray on the one hand, and the administrator Noble, and the devisees of Wm. E., R. H. having surrendered all claim, whether as heir or partner, to the real estate partitioned to W. E. At the date of the filing of the bill, the real estate was in the possession of Noble as administra-

tor, unencumbered with debt, Noble having received rents, and was claimed by two of the devisees, the others having assigned their interest to them.

Scott in April and the early part of May 1860, had shipped in his own name from Lexington, Kentucky, certain consignments of bagging, rope and twine, for sale on commission. On May 4th 1860, a small payment had been made on these consignments, and on January 1st 1861, R. H. gave Scott a note signed in the firm name for $1045.92 in settlement of part of the consignments, no account being stated as to the balance. The evidence as to the time and by whom these shipments were received is fully stated in the opinion, and need not be here repeated.

The bill alleged that separate shipments were made by Scott and by Hamilton. The proof, however, showed that the shipments were all made in Scott's name, but that Hamilton had an undisclosed interest in one of them which was transferred to Scott. It was urged in this court that this was such a variance between the allegations and proof as to entitle appellants to a reversal.

Shortly after the note was given the late war commenced, and as Offutt continued to reside at the South, and Scott and Hamilton resided in Kentucky, they had no further communication about the matter until they met in New Orleans in February 1866, when R. H. Offutt took up the original note for $1045.94, giving instead two notes, one to Hamilton and one to Scott, the respective notes being for their respective interests in the original note. These notes were given simply in renewal of the original, were signed "R. H. & W. E. Offutt," and were not intended by any of the parties as a release to the firm. Shortly after this R. H. rendered an account of sales of the consignments not before accounted for, showing a balance due Scott of $2347.20. R. H., as surviving partner, had possession of the assets of the firm, and wound up its business.

In July 1868, Scott having purchased the note given to Hamilton, brought suit on the account and notes heretofore mentioned, against R. H., in the Circuit Court of Montgomery, recovering judgment, on the 1st of February 1870, for $4952.24. Execution was duly issued on this judgment, and returned "no property found." The bill also alleged that R. H. was insolvent.

On the 18th of March 1870 Scott filed his bill, praying that an account be stated, &c., and that the real estate mentioned in

the bill be subjected to and sold for the payment of the amount found to be due upon the judgment.

R. H. Offutt, Noble the administrator, the four devisees and heirs at law of William E., and Ray, the purchaser of R. H.'s interest, were made parties defendant, and answered the bill.

The respondents objected to the relief prayed for, and set up in their answer: 1st. That the indebtedness mentioned in the bill, as shown by the bill itself, occurred after and not before the death of Wm. E. 2d. That the judgment is against R. H. individually, and not against him as surviving partner of the firm of R. H. & W. E. Offutt. 3d. That before the filing of the bill R. H. had sold his interest in the real estate, and that the real estate had been partitioned between Ray on the one hand, and the heirs and devisees and administrator of W. E. Offutt on the other, and that the portion now held by the administrator was assets of the estate of Wm. E., and subject only to payment of the debts of Wm. E., and belonging to the heirs and devisees of Wm. E. 4th. That the estate of Wm. E. is not in any way indebted to complainant, or liable to pay his demand; that the claim set up was never presented, as required by law, or to any personal representative of W. E. within eighteen months after grant of letters of administration. 5th. That the claims against the firm were open accounts at the death of Wm. E., and the same were barred by the Statute of Limitations of three years before the bill was filed, or any proceeding commenced to enforce the same against the estate of Wm. E.

The cause was submitted on bill, answers and proof. The Chancellor decreed in favor of complainant against the real estate in the hands of the administrator, and dismissed the bill as to respondent Ray. The defendants appealed.

Watts & Troy, for appellants.

Elmore & Gunter, for appellee.

PECK, C. J.—The first question that seems to arise on this record is, how is the real estate purchased of Knox and wife by Richard H. and William E. Offutt to be regarded? Did it belong to these parties as individuals, as tenants in common, or did it belong to them as partners, and, therefore, in equity subject to the payment of the partnership-debts?

The rule undoubtedly is, that real estate purchased for partnership purposes, and paid for with partnership funds, becomes partnership property, and as far as the creditors of the firm are concerned, and for the payment of their debts, it is in equity to be regarded and treated as belonging to the partnership, as assets of the firm. It is immaterial to whom the legal title may be conveyed—whether to the partners by name, as individuals, or to one of them, or to a third person: Parsons on Partnership 364.

In the case of *Lang's Heirs* v. *Waring*, 25 Ala. 639, the court say: "After much vacillation by the English courts, the doctrine may now, perhaps, be considered as settled, that, unless there is something in the articles of copartnership, or some agreement by the parties, real estate purchased with partnership funds, for partnership purposes, is, in a court of equity, converted and treated as personalty, and therefore goes to the personal representatives, and not to the heir of the deceased partner." They further say, "While the decisions of American courts generally concur in affirming that such estate is, in equity, chargeable with the debts of the partnership, and with any balance there may be due from one partner to another, there is much conflict among them as to whether the surplus, in case of the death of a partner, shall descend to the heir as real estate, or go to the personal representative for distribution." See also Story on Partnership, § 93.

It is unnecessary for us to resolve the doubt that seems to exist as to what shall be done in such a case with the surplus that may remain after the payment of the partnership debts, whether it shall be regarded as real or personal property. It seems to us, however, that the better opinion is, that it is to be treated as real property, and to be disposed of as such.

There is no positive evidence for what purpose this real estate was purchased, or with what funds it was paid for. The bill states there was a storehouse on said premises, which, after the purchase, was occupied by said firm as a *business stand;* and this is admitted by the answer of the respondents. It seems to us, therefore, the fair inference or presumption is, that this property was purchased for partnership purposes, and, also, that it was paid for out of the partnership funds. If not, why had the note of the firm been given for the $9000 that remained unpaid at the death of said W. E. Offutt? The said R. H. Offutt, who was examined as a witness, says: "The purchase was made partly for cash and

partly on a credit. The last of $9000 remained unpaid at the time of the death of William E. Offutt, and was subsequently paid to William Knox, or his order. I do not recollect at what time it was paid. The claim was an ordinary negotiable note, signed by R. H. & W. E. Offutt." It does not appear that these parties had any property outside of the business of the firm, or that did not belong to the firm.

If this is a correct view of the transaction, as we think it is, then, on the death of the said W. E. Offutt, in equity it vested, with all the other partnership property, in the surviving partner, R. H. Offutt, who thereby became entitled to the exclusive right of possession and management of the same, but only for the purpose of closing up the partnership business, and paying the partnership debts, &c. In equity he held the property in trust, first, for the payment of the partnership debts, and then for those who might be entitled to what remained, whether as heirs or personal representatives of the deceased partner, or otherwise: Parsons on Part. 364, 440.

Was the debt of the complainant upon which he recovered his judgment against the said R. H. Offutt, the debt of said firm of R. H. & W. E. Offutt, or the individual debt of said R. H. Offutt, and if the debt of said firm, had the complainant exhausted his remedy at law against said firm before the filing of this bill?

1st. The bill states that said debt grew out of shipments of bagging, rope and twine, made in Lexington, Kentucky, in the latter part of April and the early part of May 1860, which were consigned to said firm, in Montgomery, Alabama, to be sold on account of the shippers; that one R. B. Hamilton made one of said shipments, and that the other shipments were made by complainant.

The evidence, however, shows they were all made in the name of the complainant, but that said Hamilton had some interest therein, which was afterwards assigned to complainant.

These shipments, if they were received by said firm before the death of said W. E. Offutt, whether sold in whole or in part, or remaining on hand at the time of his death, constituted a legitimate part of the business of said firm, and, therefore, for the purpose of winding up the business of the firm, might be sold by the said R. H. Offutt, as surviving partner, and when sold the claim of the complainant on account thereof was properly against the said

firm, and not against the survivor as an individual; and being a claim against the firm, it was the duty of the survivor to render an account of the same to the complainant, and after deducting the usual commissions, or such as might have been agreed upon between the parties, to have paid the remainder to the complainant. A surviving partner, in winding up the business of the firm, is a trustee for all persons interested in the partnership, for the creditors of the firm, for the representatives of the deceased partner, and for himself; and his trust being to wind up the concern, his powers are commensurate with the trust, and, generally, whatever he may do in that behalf is valid, if honestly done, and within the fair scope and purpose of the trust. If there be negligence, delay, misconduct, or gross mistake, equity will interpose to give the proper relief: Parsons on Part. 440–443.

In the absence of satisfactory evidence to the contrary, it is to be presumed these shipments were received within the time then required to transport such goods from Lexington, Ky., to Montgomery, Ala., in the usual course of trade and of commercial intercourse between these places; that is, within a reasonable time. The said R. H. Offutt, in his deposition, says they were received in the fall; but we think it manifest he uses the word "fall" in a very loose manner, and without the intention to convey the meaning that they were, in fact, received after the death of his brother, the said W. E. Offutt, which happened early in September 1860, after said shipments were made. In speaking of the dissolution of said firm by the death of said W. E. Offutt, and when it ceased to do business, he says it was dissolved by the death of William E. Offutt, that it ceased to do business in the fall of 1860; and speaking of the shipment of said goods, he says, "I recollect the shipment to said firm by said plaintiff; the shipment was received in the fall of 1860." This evidence certainly does not prove the said goods were received after the dissolution of said firm by the death of W. E. Offutt. The time between the date of the last shipment, the 8th day of May, and the death of said W. E. Offutt, if it happened on the 1st day of September, thereafter, is 114 days. It seems to us unreasonable to believe, on such evidence, knowing, as we do, the facilities of transportation between the two places at that time, that 114 days elapsed between the shipment of said goods and their arrival at Montgomery. We think it far more reasonable to

believe they reached their place of destination before the expiration of half that time; therefore, we feel constrained to believe, and hold, that said goods were received by said firm before the death of W. E. Offutt, and that the complainant's debt, arising out of their sale, whether made before or after the dissolution of the firm, must be regarded as the debt of said firm, and, therefore, should be paid out of the assets of the firm.

The character of this indebtedness was not changed, nor the liability of the firm to pay the same was not released, by the settlement that was had between the said R. H. Offutt, as surviving partner, the said Hamilton and the complainant, in New Orleans, in February 1866. The said Hamilton, in his deposition, expressly states that such was not the intention of himself or of the complainant, and the inference is that such was not the intention of said R. H. Offutt, as he then renewed the note that had been given to the complainant on the first day of January 1861, for $1045.94, in the name of the firm, on account, in part, of said goods, and then, or shortly afterwards, rendered to plaintiff an account of sales, showing the firm was indebted in the further sum of $2347.20.

2. Had the complainant exhausted his remedy at law against the firm before the filing of this bill? His only remedy at law against the firm was by suit against the surviving partner: Parsons on Part. 447; *Murray* v. *Mumford*, 6 Cowen 441; 1 Ch. Pl. 50. Such suit had been brought, judgment recovered and an execution on said judgment returned by the sheriff, "no property found." This was the end of his remedy at law against the firm, and it had proved unavailing. The only remedy left was in equity, to subject this real estate to the payment of his judgment. Equity, notwithstanding the form of the conveyance, regards it as the property of the firm, and equity only can appropriate it to the payment of the debts of the firm.

On the part of the respondents, Charles L. Offutt, L. A. R. Switzer, and the administrator *de bonis non*, &c., it is objected, that said suit was brought and the judgment rendered against said R. H. Offutt, not in his character of surviving partner, but as R. H. Offutt individually, and that, therefore, said judgment did not in any way affect the partnership or the partnership property; and as to said respondents, it proved nothing, except its own existence as a judgment against R. H. Offutt, but did not prove the complainant had exhausted his remedy at law against said firm. This

objection cannot prevail. On the death of said W. E. Offutt, the complainant's only remedy at law against the firm was by suit against the surviving partner. Such a suit may properly be brought against the surviving partner, without any reference to the partnership, or that the defendant is sued as surviving partner (*Goelet* v. *McKinstry*, 1 Johns. Cases 405 : 1 Ch. Pl. 50); and an execution issued on a judgment so recovered may be levied, not only on the individual property of the defendant, but also on the personal property of the firm; consequently, the complainant's judgment in this case, and the return of the execution issued on it "no property found," not only proved the complainant had exhausted his remedy at law against the firm, but that the surviving partner himself was insolvent. Neither can the objection of the statutes of non-claim and of limitations, interposed by said respondents, be sustained. The object of the complainant's bill in this behalf is not to obtain a personal decree, or to enforce a liability against the personal representative of the deceased partner, but to enforce the trust alleged to exist in favor of the complainant, as a creditor of the said firm, against the real estate of the partnership, his remedy at law against the firm having been exhausted.

This real estate being a trust fund for the payment of the debts of the firm, and the complainant a creditor of the firm, with his remedy at law exhausted, equity will decree the payment of his debt out of said real estate, whether it be in the possession of the surviving partner or in the possession of the personal representative or the heirs of the deceased partner. Until the debts of the firm are satisfied, neither the personal representative nor the heirs of the deceased partner have any beneficial interest in the real estate of the partnership; but after they are paid, what is left becomes the property of the surviving partner, and the personal representatives or heirs of the deceased partner discharged of the trust: Parsons on Part. 372, 441, and note *p*.

The respondent Ray, in his answer, claims that as to the half interest of the surviving partner, R. H. Offutt, in said real estate, he is a *bonâ fide* purchaser for valuable consideration, without notice, and therefore entitled to hold it against the equity of the complainant, as a creditor of the firm. This, on the hearing, was conceded by the complainant's counsel, and they admitted that, as to said half interest, the complainant was entitled to no relief.

The bill, as to said respondent, was therefore properly dismissed. As to the remaining half interest, that is, the interest of the estate of the deceased partner, we see no reason why it should not be subjected to the payment of the complainant's debt. The fact that it had passed into the possession of the deceased partner's administrator, with the permission of the surviving partner, and that he and and the respondent, R. H. Offutt, as heirs of the said W. E. Offutt, had assigned their interest in the same to the respondents, Charles L. Offutt and A. L. R. Switzer, who are also heirs of said W. E. Offutt, and that a partition had been made between said respondent Ray and said Charles L. Offutt and A. L. R. Switzer and said administrator, it seems to us, cannot defeat the complainant's equity as a creditor of the firm. As far as appears, the said assignment was a mere voluntary assignment, without consideration, and as the surviving partner, from whom the said administrator obtained the possession, held it as a trustee for the creditors of the firm, his possession can stand upon no better equity than the possession of the person from whom he received it, without paying anything for it. It still remains trust property, and equity will appropriate it to the purposes of the trust.

As to the alleged variance between the statements of the bill and the proof, it seems to us said variance is insufficient to prevent a decree in favor of the complainant. It could hardly have operated as a surprise to the respondents, and we do not see how they are prejudiced or injured by it, and if not surprised or injured by it, then it should be regarded as an immaterial variance: *Lock's Ex.* v. *Palmer*, 26 Ala. 312; *Chapman* v. *Hamilton*, 19 Ala. 121.

The Chancellor decreed that the complainant was entitled to relief, out of the half interest of said real estate not conveyed to said respondent Ray, to the extent of one-half of the amount of the partnership assets of $9000 used by said R. H. Offutt, after the death of said W. E. Offutt, in payment for said real estate, and interest thereon, from the time the administrator, respondent Noble, commenced receiving the rents and profits of the same. The reasons of the Chancellor for limiting his decree by the amount of the assets of the firm paid for said real estate, after the death of said W. E. Offutt, and subjecting the interest of the estate of the deceased partner in the same to one-half of that amount only, with interest thereon from the time the administrator commenced receiving the rents and profits on said real estate, are not stated in

the opinion ; whatever his reasons may have been, it seems to us there is no error in the decree on that account of which the appellants can complain. The complainant certainly gets no more by it than he is entitled to.

The decree is affirmed, at the costs of the appellants.

United States Circuit Court, Eastern District of Wisconsin.

ANGELINA AMORY *v.* SAMUEL B. AMORY ET AL.

The Circuit Courts of the United States have jurisdiction of a bill to enjoin the executors of a will, which has been admitted to probate by the county court of a state, from using it to defeat the rights of a citizen of another state.

The decree or judgment of a state court can be avoided on the ground of fraud, both in the courts of the United States and of another state.

The legislature of a state cannot deprive a citizen of another state of his legal or equitable rights under the Constitution and the laws of Congress, by declaring in what courts they must be enforced.

THIS was a bill in equity, originally filed in the Circuit Court of Fond du Lac, and transferred thence to the Circuit Court of the United States, praying for an injunction to restrain the executors of the last will and testament of James Amory from setting up or using the said will to defeat the legal rights of the complainant.

The judges of the Circuit Court were divided in opinion as to whether a demurrer to the bill should be sustained.

Judge MILLER'S opinion has already been published: *ante p.* 38.

J. M. Gillett, for complainant.

S. W. Pinney, for defendant.

DRUMMOND, Circuit J.—On the 16th of August 1861 James Amory died at Fond du Lac, in this state, possessed of considerable personal and real estate, part of which was in Wisconsin. In September following, Samuel B. Amory and John Amory, the brothers of James, presented in the county court of Fond du Lac county a will, and asked that it be probated. Sometime afterwards the present plaintiff appeared by counsel in that court, claiming to be the widow and heir of James Amory, and objected to the probate of the will, and asked for time to show that it was not the will of James Amory, and should not be probated.